Supreme Court, U. S.
FILED
AUG 25 1977
MICHAEL RODAK, JR., CLERK

APPENDIX.

In the Supreme Court of the United States.

OCTOBER TERM, 1976

No. 76-1500

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petition for Certiorari Filed April 28, 1977

Certiorari Granted June 20, 1977

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United States District Court
District of Massachusetts

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v. CIVIL ACTION NO. 75-3987-G

UNITED STATES OF AMERICA,
DEFENDANT

Docket Entries

1975		
September		
23	Complaint filed.	
	Summons, issued.	
November		
17	Marshal's return of service dated 10/8/75, filed.	
December		
10	Deft's motion to dismiss for failure to state a claim upon which relief can be granted, filed.	
	Deft's memorandum in support of motion to dismiss, filed, c/s.	

1976

January

3 *Garrity, J.* Procedural Order: No opposition has been filed to d's motion to dismiss; if allowance opposed, Pltf. shall file a memorandum of law, fully responding to D's memorandum filed 12/10/75 on or before 1/23/76, cc/cl

23 P's motion (assented to) to extend time for filing memorandum of law until 1/28/76, filed.

27 P's memorandum of law in opposition to motion to dismiss, filed, c/s.

29 *Garrity, J.* 2nd Procedural Order: Hearing on Deft's motion to dismiss scheduled for 2/23/76 at 3 PM, cc/cl. Any reply brief by defendant shall be filed on or before 2/17/76.

February

10 Pltf's request for production of documents, filed, c/s

23 Deft's reply memorandum in support of D's motion to dismiss, filed c/s

Garrity, J. After hearing, Deft's motion to dismiss GRANTED for reason dictated to the court reporter.

March

26 *Garrity, J.* Judgment, ENTERED, cc/cl

April

26 Plntff's Notice of Appeal, filed. c/s.

1976

June

16 Certified copy of docket entries and Original pleadings forwarded to Court of Appeals for the First Circuit.

1977

January

31 Opinion received from the Court of Appeals entered. . . . Affirmed.

February

23 Mandate received from the Court of Appeals entered. . . . Affirmed. Costs in favor of appellee $196.80. Original pleadings returned from Court of Appeals.

United States Court of Appeals for the First Circuit

No. 277

COMMONWEALTH OF MASSACHUSETTS

v.

UNITED STATES OF AMERICA

Docket Entries

1976		
June		
16		Record on appeal in one volume filed and case docketed by leave of court.
21		Statement of issues and designation of contents, filed.
29		Appearances of Scott P. Crampton and Gilbert E. Andrews for appellee, filed.
July		
20		Motion filed. Order (Coffin, Ch. J.) enlarging time for filing brief and appendix to July 30, 1976 and further enlarging time for filing brief for appellee to August 27, 1976. Notices mailed.
30		Brief for appellant and appendix filed.
August		
27		Brief for appellee filed.
		Appearances of Gilbert Andrews, Ann Belanger and Alfred S. Lombardi for appellee filed.

1976		
September		
13		Heard by Coffin, McEntee and Campbell.
January		
28		JUDGMENT: The judgment of the district court is affirmed. Notices mailed. Opinion of the court by McEntee, Circuit Judge.
1977		
February		
10		Verified and itemized bill of costs filed for appellee.
18		Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed.
May		
3		Notice of filing petition for certiorari 76-1500 April 28, 1977.
June		
25		Order of Supreme Court granting the petition for a writ of certiorari. June 20, 1977.

United States District Court
District of Massachusetts

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v. CIVIL ACTION NO. 75-3987-G

UNITED STATES OF AMERICA,
DEFENDANT

Complaint

INTRODUCTORY STATEMENT

1. This is a civil action for refund of a tax illegally imposed on the Commonwealth of Massachusetts by the Internal Revenue Service. The federal excise tax on the use of civil aircraft was applied to a helicopter owned and operated by the Commonwealth. As the helicopter is used exclusively for state police purposes, the tax on its use violates the constitutional principle of intergovernmental tax immunity and is therefore invalid.

SUBJECT MATTER JURISDICTION

2. The jurisdiction of this Court over an action against the United States for the illegal imposition and collection of a tax is provided by 28 U.S.C. § 1346(a)(1). The aircraft use tax for the period July 1, 1970 through June 30, 1971

has been paid in full and a claim for refund duly filed. The Internal Revenue Service has rejected that claim.

PARTIES

3. The plaintiff is the Commonwealth of Massachusetts, a sovereign State of the United States of America. Funds of the Commonwealth were the source of payment for the aircraft use tax.

4. The defendant is the United States of America, the proper party defendant in a civil action for refund under 26 U.S.C. § 7422.

STATEMENT OF FACTS

5. The Department of Public Safety is a duly constituted agency of the Commonwealth of Massachusetts. Within that department is the Division of State Police. Mass Gen. L. ch. 22, § 3. The purpose of the state police is "to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth." Mass. Gen. L. ch. 22, §§ 9, 9A.

6. One instrument utilized by the state police in performing its public functions is a helicopter, owned by the Commonwealth and operated by state police personnel. This helicopter was obtained by the state police in November 1969 and was registered with the Federal Aviation Administration (#N1 484W) as a public use aircraft.

7. The state police helicopter is primarily used to promote highway safety. In the course of performing that function it serves as an airborne command post, effects emergency evacuations in cases of personal danger and provides transportation in medical emergencies. The heli-

copter is also used to promote other public safety functions such as assisting in searches for criminals and escapees from correctional facilities.

8. The state police helicopter was used exclusively for state police purposes during the period July 1, 1970 through June 30, 1971.

9. On March 20, 1974, the Internal Revenue Service demanded immediate payment of the aircraft use tax from the Commonwealth of Massachusetts for the period of July 1, 1970 through June 30, 1971. (Exhibit A). Along with the tax of $131.43, interest in the amount of $26.75 and penalty in the amount of $25.22 was demanded. On the basis of legal advice from the Attorney General of Massachusetts, the Department of Public Safety refused to pay the tax. (Exhibit B).

10. On April 26, 1974, the Internal Revenue Service levied on funds of the Commonwealth of Massachusetts held by the First National Bank of Boston. (Exhibit C). The amount of $183.00 thus collected was for the tax, plus interest and penalty, on the use of the state police helicopter for the period July 1, 1970 through June 30, 1971.

11. On June 5, 1974 the Commonwealth of Massachusetts filed a claim for refund of the monies collected. The claim was based on the unconstitutionality of a tax whose legal incidence is on a sovereign State of the United States and whose subject involves the performance of an exclusively public function. (Exhibit D).

12. On May 30, 1975, the Internal Revenue Service disallowed the claim for refund. (Exhibit E).

Cause of Action

13. The Airport and Airway Revenue Act of 1970, Public-Law 91-258, added § 4491 to the Internal Revenue Code of 1954. Under § 4491, a use tax was to be assessed on "taxable civil aircraft," a term which § 4492(a) defines, in part, as "any engine driven aircraft - . . . registered, or required to be registered, under section 501(a) of the Federal Aviation Act of 1958 (49 U.S.C., sec. 1401(a))1 . . ." As an aircraft registered under 49 U.S.C. § 1401, the state police helicopter comes within the scope of the statutory definition of "taxable civil aircraft." Thus, by operation of these statutes, a federal tax is imposed on the use of the state police helicopter by the Commonwealth of Massachusetts.

14. The imposition of a tax on the use of property owned by the Commonwealth of Massachusetts and employed in the furtherance of public purposes violates the constitutional doctrine of intergovernmental tax immunity. Section 4491 is therefore unconstitutional as applied to the state police helicopter.

Relief Requested

Wherefore, the plaintiff respectfully requests that this Court:

15. Declare 26 U.S.C. § 4491 unconstitutional as applied to property of the Commonwealth of Massachusetts used for exclusively governmental purposes.

16. Order the Internal Revenue Service to refund all monies, with interest, collected from the Commonwealth of Massachusetts pursuant to § 4491.

17. Grant such additional and further relief as the Court deems appropriate.

By their attorneys,
FRANCIS X. BELLOTTI
Attorney General
TERENCE P. O'MALLEY
Assistant Attorney General

Dated: September 22, 1975

Exhibit A

DEPARTMENT OF THE TREASURY

DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE
Date: March 20, 1974.
In reply refer to: Twiss

Commonwealth of Massachusetts, Department of Public Safety
1010 Commonwealth Ave.
Boston, Massachusetts 02215
Attn: Capt. Kelly
Fiscal Division

Year or Period Ended:	June 30, 1971
Tax Form Number:	4638 Aircraft Use Tax
Tax:	$131.43
Interest:	26.75
Penalty:	25.22
Balance Due:	$183.30

We have previously written you requesting payment of the balance due on your tax account identified above, but we have no record of receiving it.

We urge you to immediately send what you owe, payable to Internal Revenue Service. The enclosed envelope is for your convenience.

We look forward to hearing from you within the next few days.

Sincerely yours,

ROBERT M. TWISS
Revenue Officer

Exhibit B

1010 Commonwealth Avenue
Boston, Massachusetts 02215
April 2, 1974

Mr. Robert M. Twiss
Revenue Officer
Director of Internal Revenue
John F. Kennedy Building
Boston, Massachusetts

Re: Mass. SP Helicopter Tax
Tax Form # 4638 (6/30/71)

Dear Mr. Twiss:

Your letter of March 20, 1974 is acknowledged. Please be advised that it is the position of this Department, notwithstanding the provisions of the Internal Revenue Code, the State Police helicopter is used solely for a governmental function. As such, Congress has no power to assess taxes on State government (see Ambrosini v. U.S. 197 U.S. 1, Willcuts v. Bunn 232 U.S. 216). Kindly forward a copy of your ruling.

This Department has been further advised by the Attorney General of Massachusetts on March 23, 1973, that such a tax is unconstitutional and should not be paid.

Kindly refer all future correspondence and telephone inquiries to the Office of the Attorney General, State House, Boston, Massachusetts.

Very truly yours,

FRED L. LAMSON
Deputy Commissioner

Exhibit C

FORM 668-A
(Rev. Feb. 1967) April 26, 1974

U.S. TREASURY DEPARTMENT — INTERNAL REVENUE SERVICE

Notice of Levy

TO: First National Bank of Boston
100 Federal St.
Boston, Massachusetts

Originating District
Boston, Massachusetts

You are hereby notified that there is now due, owing and unpaid to the United States of America from the taxpayer whose name appears below the sum of $183.30

Tax Form No.	*Period Ended*	*Date of Assessment*
4638	06-30-71	11-06-70

Identifying No.	*Unpaid Balance of Assessment*	*Statutory Additions*
04-6002284N	131.43	26.65 int. 25.22 pen.
TOTAL AMOUNT DUE		$183.30

You are further notified that demand has been made for the amount set forth herein upon the taxpayer who has neglected or refused to pay, and that such amount is still due, owing, and unpaid from this taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer, or on which there is a lien provided under Chapter 64, Internal Revenue Code of 1954, are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability. Checks or money orders should be made payable to "Internal Revenue Service".

ROBERT M. Twiss
Revenue Officer
Boston, Massachusetts

(Name and Address of Taxpayer)

Commonwealth of Massachusetts
Department of Public Safety
1010 Commonwealth Ave.
Boston, Massachusetts 02215

Certificate of Service

I hereby certify that this levy was served by delivering a copy of this notice of levy to the person named below.

NAME

TITLE

DATE AND TIME

SIGNATURE OF REVENUE OFFICER

Exhibit D

FORM 843 — Director's Stamp (Date received)

Claim

The Internal Service will indicate in the block below the kind of claim filed, and fill in, where required.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of amount paid for stamps unused, or used in error or excess.

☐ Abatement of Tax Assessed (Not Applicable to Income, Estate or Gift Taxes).

Name of taxpayer or purchaser of stamps
Commonwealth of Massachusetts (Department of Public Safety)
Number and street
1010 Commonwealth Avenue
City or town, State, and ZIP code
Boston, Massachusetts 02215

Fill in applicable items — Use attachments if necessary

a. Your social security number

Wife's number, if joint return

b. Employer identification number (if any)
04-6002284N
c. Internal Revenue Service office where return (if any) was filed
Boston, Mass.

d. Name and address shown on return, if different from above

---

e. Period — if for tax reported on annual basis, prepare separate form for each taxable year

From July 1, 1970 to June 30, 1971.

f. Kind of tax

Aircraft Use Tax (4683)

g. Amount of assessment

$ 131.43

Dates of payment

April 26, 1974 (Notice of Levy)

h. Date stamps were purchased from Government

i. Amount to be refunded (if income tax, complete computation below)

$ 183.30

j. Amount to be abated (not applicable to income, estate, or gift taxes)

$ 131.43

k. The claimant believes that this claim should be allowed for the following reasons:

The helicopter upon which this tax was assessed is used by the Commonwealth of Massachusetts, through the Department of Public Safety, exclusively for state police purposes. This is a unique state activity. The tax in question as applied to the Commonwealth of Massachusetts is therefore unconstitutional.

Computation of Income Tax Refund

	Income Tax
1. Tax withheld	_____
2. Estimated tax paid	_____
3. Tax paid with original return	_____
4. Any additional income tax paid	_____
5. Total tax paid (add lines 1-4)	_____
6. Less: Your computation of correct tax	_____
7. Amount of overpayment	_____
8. Amount previously refunded	_____
9. Net overpayment (enter in item 1 above)	_____

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct and complete.

Terence P. O'Malley, Assistant Attorney General
373 State House, Boston, Massachusetts 02133

Dated ..... May 31, ..., 1974

Exhibit E

Internal Revenue Service
District Director

Date: 5-30-75

Commonwealth of Massachusetts
Dept. of Public Safety
1010 Commonwealth Ave.,
Boston, Mass. 02215

Department of the Treasury
P.O. Box 9107
Social Security or Employer Identification Number:
04-6002284
Document Locator Number:
74638-290-01100-0
Kind of Tax:
Civil Aircraft
Tax Period Ended:
July 31, 1970
Amount Claimed:
$131.43
Date Claim Received:
June 5, 1974
Person to Contact:
W. Pilotte
Contact Telephone Number:
223-7075

Gentlemen:

We are sorry, but we cannot allow the above claim for an adjustment of your tax, for the reasons stated below. Our decision is based on provisions of the internal revenue laws and regulations. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims, 717 Madison Place NW., Washington, D.C. 20005. The law permits

you to do this within 2 years from the mailing date of this letter. Suit may not be filed in the United States Tax Court.

If you have any questions, please contact the person named above.

Sincerely yours,

J. W. FORESTALL
District Director

Reasons for disallowance:
PER AUDIT DETERMINATION

United States District Court for the District of Massachusetts

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v. CIVIL ACTION No. 75-3987-G

UNITED STATES OF AMERICA,
DEFENDANT

Defendant's Motion to Dismiss for Failure to State a Claim Upon which Relief can be Granted

Defendant, the United States of America, by its attorney, James N. Gabriel, United States Attorney for the District of Massachusetts, respectfully moves this Court, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure to dismiss the complaint herein because of its failure to state a claim upon which relief can be granted.

The considerations and authorities in support of this motion are set forth in the attached memorandum.

JAMES N. GABRIEL
United States Attorney
By: WILLIAM A. BROWN
United States Attorney
Chief, Civil Division

Of Counsel:
DENNIS DONOHUE
Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-3640

[Certificate of service omitted in printing.]

[The Transcript of the Opinion of the District Court dated February 23, 1976, is printed in a separate appendix to the Petition for a Writ of Certiorari at pages (A-1) — (A-3).]

[The Judgment of the District Court dated March 26, 1976, is printed in a separate appendix to the Petition for a Writ of Certiorari at page (A-4).]

United States District Court
District of Massachusetts

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF

v. CIVIL ACTION No. 75-3987-G

UNITED STATES OF AMERICA,
DEFENDANT

Notice of Appeal

Notice is hereby given that the Commonwealth of Massachusetts, plaintiff in the above-entitled action, appeals to the United States Court of Appeals for the First Circuit from the judgment entered in this action on the 26th day of March, 1976.

By its Attorney,
TERENCE P. O'MALLEY
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
617-727-1014

[Certificate of service omitted in printing.]

[The Opinion of the Court of Appeals dated January 28, 1977, is printed in a separate appendix to the Petition for a Writ of Certiorari at pages (A-5) — (A-10).]

[The Judgment of the Court of Appeals dated January 28, 1977, is printed in a separate appendix to the Petition for a Writ of Certiorari at page (A-11).]

Supreme Court of the United States

No. 76-1500

MASSACHUSETTS,
PETITIONER,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI. Filed June 20, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.
